No. 83-740

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

DEL-AWARE UNLIMITED, INC., et al.,
Petitioners

v.

ROGER M. BALDWIN, District Engineer
United States Corps of Engineers, et al.,
*Respondents**

BRIEF OF NESHAMINY WATER RESOURCES AUTHORITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 2, 1983

*A full list of the parties is set forth on page ii of this Brief.

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LIST OF PARTIES

DEL-AWARE UNLIMITED, INC., VAL SIGSTEDT, COLLEEN WELLS, MARC SADOUX, MARION W. MASLAND, TOWNSHIP OF BRISTOL, NORMAN AND DIANE TORKELSON, THE PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS, SAMUEL LANDIS, CHARLES GILMORE, MARY ELLEN NOBLE, THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS, HONORABLE RITA C. BANNING, WATERSHED ASSOCIATION OF THE DELAWARE RIVER, HONORABLE JAMES C. GREENWOOD, HONORABLE CARL FONASH,

Petitioners

v.

ROGER M. BALDWIN, individually, and as District Engineer, U.S. Army Corps of Engineers, ALEXANDER ALDRICH, individually and as Chairman of the Advisory Council on Historic Preservation, WILLIAM GORDON, individually and as Assistant Secretary U.S. Department of Commerce; GERALD HANSLER, individually, and as Executive Director, the Delaware River Basin Commission, HAROLD DENTON, individually and as Director, Division of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, THE NUCLEAR REGULATORY COMMISSION; THE HONORABLE PETER DUNCAN, as Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania; NESHAMINY WATER RESOURCES AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY,

Respondents

TABLE OF AUTHORITIES

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I. COUNTER-STATEMENT OF THE ISSUES

1. Did the District Court and the Court of Appeals correctly define the scope of the District Court's consideration of evidence dehors the Administrative Record?

2. Does the Third Circuit's conclusion that the District Court did not commit an abuse of discretion in denying petitioners' motion for a preliminary injunction holding, in pertinent part, that petitioners were not likely to prevail on their claim under, *inter alia*, the National Historic Preservation Act, create a case of such national importance to justify this Court's certiorari jurisdiction before a full trial on the merits?

II. COUNTER-STATEMENT OF THE CASE

With this Petition from the affirmance by the United States Court of Appeals for the Third Circuit from the denial of the petitioners' application for a preliminary injunction, this Court is presented with yet another in a seemingly endless parade of requests to halt the development of the Point Pleasant Water Diversion Project ("Project"), and thus prevent the drawing of water from the Delaware River for essential public water supply in Bucks and Montgomery Counties, Pennsylvania, and for use as cooling water for Philadelphia Electric Company's ("PECO") Limerick Plant, Montgomery County, Pennsylvania. *See, Environmental Coalition of Nuclear Power v. NRC*, ____ F.2d ____ (No. 75-1421, 3d Cir. 1975); *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981) *aff'd*, 681 F.2d 805 (3d Cir. 1982). In the courts below, petitioners attacked, *inter alia*, the issuance of a permit to the Neshaminy Water Resources Authority ("NWRA") by the United States Corps of Engineers ("Corps of Engineers") to permit the NWRA to construct and operate the Point Pleasant Project. Petitioners claimed that the issuance of the permit violated the National Environmental Policy Act of 1969 and a host of other acts and regulations.

Since 1966, there have been four final Environmental Impact Statements, and several Environmental Assessments and Environmental Reports by a variety of federal and state agencies, including the Delaware River Basin Commission ("DRBC"), the United States Nuclear Regulatory Commission ("NRC"), the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the NWRA and the PECO. Supporting these overall reviews were countless specific scientific studies and reviews, negotiated changes in one or more aspects of the Project and a fifteen-year effort to minimize, if not totally eliminate, any risk of harm to the

environment from the Project. The history of these exhaustive studies, reviews and reports, and their results, is set forth in the detailed Findings of Fact of the District Court below, (A-79 to A-96; A-83 to A-127).

These findings by the District Court are not clearly erroneous and amply support the Third Circuit's affirmance that petitioners failed to demonstrate a likelihood of success on the merits or a threat of significant, immediate and irreparable harm if a preliminary injunction did not issue, but to the contrary established that the respondents NWRA and PECO, as well as the public, would suffer serious harm if the project were delayed.

For the reasons set forth more fully below, this Court should deny exercising certiorari jurisdiction.

III. ARGUMENT

A. PETITIONERS HAVE IMPROVIDENTLY REQUESTED THIS COURT TO REACH THE ULTIMATE MERITS OF THEIR CASE AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI JURISDICTION

The sole basis for appellate review of the actions of the United States District Court for the Eastern District of Pennsylvania is that the court denied petitioners' motion for a preliminary injunction. An order granting or denying a preliminary injunction will not be disturbed unless it was an abuse of discretion by the trial court. *See, e.g., City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Brown v. Chote*, 411 U.S. 452 (1973); *Alabama v. United States*, 279 U.S. 229 (1929). And, if this Court decides to exercise certiorari jurisdiction over this case, the sole issue which the Court may address is whether the Court of Appeals for the Third Circuit erred when it ruled that the district court did not abuse its discretion in denying petitioners' request for a preliminary injunction. This Court does not have jurisdiction, at this stage of the proceedings, to decide the issues framed by the petitioners since these issues relate to the ultimate merits; issues which were not finally decided by the District Court nor the Third Circuit Court of Appeals. *Accord, Brown v. Chote, supra.*

The rationale upon which this limited standard of appellate review is based was articulated by this Court in *University of Texas v. Camenisch*, 451 U.S. 390 (1981), wherein Justice Stewart stated:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary

> injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Id. at 395; *see also, U.S. Steel Corporation v. Fraternal Association of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970).

In evaluating whether to issue the requested preliminary injunction, the District Court placed the burden on petitioners to show: (1) that they will be irreparably injured *pendente lite* if relief is not granted, and (2) that they have a reasonable probability of eventual success in the litigation. *Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc.*, 630 F.2d 120 (3d Cir. 1980), *cert denied*, 449 U.S. 1014 (1980); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980). *Accord, Brown v. Chote, supra.* The District Court further considered (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Oburn v. Shapp*, 521 F.2d. 142, 147 (3d Cir. 1975); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-920 (3d Cir. 1974); *A.L.K. Corp. v. Columbia Pictures Industries, Inc.*, 440 F.2d 761, 763 (3d Cir. 1971). *Accord, University of Texas v. Camenisch, supra.*

While petitioners' complaint alleged that the Project would cause the destruction of everything from a fishing spot adjacent to Point Pleasant to life as we know it in Bucks and Montgomery Counties, Pennsylvania, petitioners failed to identify and prove which, if any, of the alleged dangers would become fixed and would be irreparable pending litigation on the merits. Indeed, petitioners failed to proffer one witness to testify on their irreparable harm.

By contrast, both the Corps of Engineers' administrative record and the DRBC administrative record evaluated by the District Court indicated the great public interest served by the Project. The testimonies of John Muller, engineering consultant of the Neshaminy Water

Resources Authority, and Vincent Boyer, Vice-President of Philadelphia Electric Company, demonstrated the enormous financial harm which would accrue to private and public interests in the event a preliminary injunction would issue. In denying the preliminary injunction, the District Court held, in pertinent part:

> In considering whether or not the plaintiffs have borne their burden of proving entitlement to injunctive relief, the Court must consider whether or not the plaintiffs will suffer irreparable harm if relief is not granted, or whether the defendants will be harmed if relief is granted, whether the public, generally, will be harmed if relief is granted and whether the plaintiffs are likely to prevail on the merits of the claim. I have found that considering the evidence before me, that the plaintiffs have not shown that they are likely to prevail on the merits of the claim. I have considered whether or not the construction in the Delaware River or environs should be enjoined until such time as the NRC acts or the Corps acts upon the rechannelization project in terms of permitting or not. The PUC has determined Limerick I's construction is in the best interest of the public and it has directed that PECO complete that construction at the earliest possible time consistent with public safety. The requirements placed upon the applicant NWRA by the Pennsylvania DER is to complete all construction by the end of 1984. The work in the river has to take place within a specified time during any winter, reducing the period of time that can be devoted to construction and with construction with deliberateness, with a view towards public safety and compliance with the minimization of loss of water in transport. The DRBC has determined a need for water in Bucks and Montgomery Counties, based upon the experience in 1980 and 1981 of water problems in those areas with wells running dry.

> Balancing the harm that would occur to the public if the project is not available mechanically for the supply of water to [Bucks] and Montgomery Counties through NWRA to supplement the well water and considering the harm to the public if Limerick I is not available for operation on time because of the lack of completion of the mechanical project, versus the harm to the river, to the canal, to the environs, including the bluff, *I find that on balance, the public would suffer more harm if the project presently is enjoined than if it continues.*

(A-60 to A-63) (emphasis supplied).

Petitioners did not challenge these findings of the District Court in the Court of Appeals nor have they requested certiorari on these issues. Their petition raises two abstract legal issues which, even if decided in their favor, would not be grounds for reversing the lower courts' denial of a preliminary injunction.

The extraordinary request made by petitioners in this case is analogous to the issues posed by the state of California in *Brown v. Chote, supra.* Seeking to run in the California primary election but deprived of the opportunity to do so because of his inability to pay the filing fee required under the California Elections Code, appellee filed a class action suit challenging the constitutionality of the filing fee and moved the District Court to issue a preliminary injunction. Noting that absent a preliminary injunction, appellee's constitutional right might be irreparably lost for failure to file nomination papers before the deadline, that the appellee *might* prevail on the merits, and that the state of California had failed to show the necessity, purpose or reasonableness of the statute in question, the District Court granted the preliminary injunction.

The state of California appealed[1] positing two ques-

1. Unlike the present case, *Brown v. Chote* arose under 28 U.S.C. §1253 on direct appeal from a three-judge district court in the Northern District of California. *Id.* at 452.

tions for review. First, whether under the Equal Protection Clause, the rational relationship test or the strict scrutiny test applied to the state statute challenged; and second, whether the California Election Code denied indigent voters equal protection of the laws. Refusing to reach the issues raised by the state of California because they went to the ultimate merits of the case, this Court held, in pertinent part:

> In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court.
>
> The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief. As the District Court opinion clearly evidences, issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute. In the exigent circumstances, the grant of extraordinary interim relief was a permissible choice; but on the very limited record before the District Court a decision on the merits would not have been appropriate. In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion.

Id. at 456-457.

The District Court in the present case, like the District Court in *Brown v. Chote*, addressed itself to one issue and one issue only — whether to grant a preliminary

injunction. In determining petitioners' likelihood of success on the merits, one prong of the four-prong preliminary injunction standard, the District Court, consistent with this Court's teachings in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), looked primarily to the administrative records already in existence and determined that petitioners were not likely to succeed on their claims under, *inter alia*, the National Historic Preservation Act. As this Court noted in *University of Texas v. Camenisch*, 451 U.S. at 394, it is improper to equate " 'likelihood of success' with 'success,' . . . because it ignores the significant procedural differences between preliminary and permanent injunctions."

Because petitioners are requesting this Court to equate "likelihood of success with success," because independent grounds existed for the Third Circuit to affirm the District Court's denial of a preliminary injunction and because of this Court's narrow scope of review, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

B. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY DEFINED THE SCOPE OF THE DISTRICT COURT CONSIDERATION OF EVIDENCE DEHORS THE ADMINISTRATIVE RECORD.

District Court review of agency action under the National Environmental Policy Act, 42 U.S.C. §§433 *et. seq*, and the other acts upon which petitioners base their claims is quite narrow. The court is limited to determining whether the decision was based upon a consideration of relevant factors, and whether there has been a clear error of judgment or abuse of discretion. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Moreover, in conducting this review, the final decision of the agency is entitled to a presumption of regularity. *Id.* at 415. Agency action may be set aside

only where it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Administrative Procedures Act ("APA"), 5 U.S.C. §706(2). This standard of review is "highly deferential," and certainly does not permit a *de novo* determination by the reviewing court. *Avoyelles Sportsmen's League, Inc. v. Marsh*, ____ F.2d ____, 19 E.R.C. 1841, 1846 (5th Cir., Opinion filed September 26, 1983). Indeed, this Court has repeated time and again that the reviewing court may not substitute its judgment for that of the agency. *See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, supra; United States v. Bianchi*, 373 U.S. 709, 715 (1963).

While claiming that they are not taking issue with this standard, nor suggesting that the District Court failed to apply it properly, petitioners nevertheless ask this Court to review the District Court's ruling that allegedly excluded certain evidence proffered by them. This Court should not grant review of this question because the petitioners' suggested conflict among the circuits does not exist, and the District Court did not abuse its discretion when it excluded certain evidence which, by petitioners' own admission, would have been duplicative of evidence already in the administrative record and which was never properly proffered by counsel to the court below.

1. *The Asserted Conflict Among The Circuits Does Not Warrant Review.*

In *Vermont Yankee*, this Court made clear that Congress committed to various agencies a host of substantive decisions including the likelihood and magnitude of harm to the environment from various actions, the avail-

ability of alternatives and the choice of action or non-action from among those alternatives. Since these decisions are to be made by the agencies — and not by the courts — certain things follow.

Interested parties must present their views and the bases for their views to the deciding agency for its consideration and may not hold back information hoping to present it to the district court at a later date. Since interested parties are required to present their views to the agency, the reviewing court must limit its review to the record developed before the agency, which, presumptively, contains all of the relevant evidence and an explanation by its proponents of why it is relevant and of what significance it is. While adequate judicial review of a complicated record filled with technical scientific data may require a court to "immerse" itself in the administrative record, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) *cert. denied*, 426 U.S. 941 (1976), cited in *Avoyelles Sportsmen's League, Inc. v. Marsh, supra.*, 19 E.R.C. at 1846, the issue before the reviewing court is not whether the agency made the correct decision, but whether it followed the correct procedures and whether its decision was arbitrary and capricious or an abuse of discretion based upon the record before it. *Strycker's Bay Neighborhood Council, Inc. v. Karlen, supra; Vermont Yankee, supra; Kleppe v. Sierra Club, supra; Citizens to Preserve Overton Park, supra; Avoyelles Sportsmen's League, Inc. v. Marsh, supra; Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981). With these principles, not even petitioners disagree.

The necessary implication of this Court's decision in *Vermont Yankee* is, therefore, that evidence outside the administrative record would be relevant and admissible only to the extent necessary to show that some relevant environmental injury or some meaningful alternative was excluded by the agency from consideration, or to explain to the reviewing court, if the reviewing court

deemed it necessary, the meaning or significance of material already in the administrative record. This is precisely the test applied by the District Court and upheld by the Court of Appeals for the Third Circuit below, and no circuit court has ruled otherwise since this Court's decision in *Vermont Yankee*.

Petitioners rely upon three principal cases in the Second, Fifth and District of Columbia Circuits respectively to support their claim that there is a significant disagreement among the circuit courts on the scope of the record which the District Court may consider. Those cases are *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977); *Image of Greater San Antonio, Texas v. Brown*, 570 F.2d 517 (5th Cir. 1978) and *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981). Of these, only *County of Suffolk* squarely addresses the issue and reaches a conclusion in harmony with the position urged by petitioners.

Image of Greater San Antonio is simply not relevant. The Fifth Circuit there held that an allegation of socio-economic harm, without harm to the physical environment, resulting from a massive layoff at a nearby government facility would not state a claim for relief under NEPA, and sustained the decision not to prepare an Environmental Impact Statement ("EIS") under NEPA.

In *Izaak Walton League*, the District of Columbia Circuit, in a footnote, stated that "Allegations that an impact statement failed to consider serious environmental consequences or realistic alternatives raise issues sufficiently important to warrant introduction of new evidence in the District Court." 655 F.2d at 369, n.56. The text to which this comment is footnoted, however, quotes from this Court's decision in *Overton Park* holding that final agency action must be reviewed "based on the full administrative record that was before the *decision maker* at the time he made his decision." *Overton*

Park, 401 U.S. at 369. The circuit court then went on to reject the claim that the district court should have resolved certain disputed factual issues *de novo* after hearing the experts on both sides.

> [reviewing] courts should not substitute their judgment for that of the agency. *Kleppe v. Sierra Club, supra*. . . . In particular, it should not attempt to resolve conflicting scientific opinions. . . . So long as the agency's conclusions have a substantial basis in fact, the mandate of NEPA has been satisfied.

655 F.2d at 371-372.

Thus, a fair reading of the decision in *Izaak Walton League* demonstrates that where evidence outside the administrative record is necessary to prove that there are "serious environmental consequences or realistic alternatives" that the agency excluded from consideration, evidence may be introduced before the District Court to show such exclusion or the materiality of the alternatives not considered. The decision does not support petitioners' claim to a blanket right to present evidence to the district court on issues which were actually before the administrative agency in an attempt to get the court to second guess the agency's evaluation of those issues. Counsel for petitioners stated to the district court and the Court of Appeals that the testimony of all of the witnesses he desired to call had been presented to the reviewing agency, (Appendix "B" to Brief, p. B-1 and B-2).[2] Thus, there is no basis in *Izaak Walton League* which supports review of this case by this Court.

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2. Relevant portions of the Joint Appendix submitted to the United States Court of Appeals for the Third Circuit have been included herein in Appendix "B" to Brief.

In the case at bar, the District Court took the most reasonable, pragmatic approach, and gave petitioners the greatest leeway in their attempt to turn the review of an administrative decision into a new trial on the merits. *See, e.g.*, A-11 to A-12. The court permitted counsel to argue what was in the administrative record, why it demonstrated that the agency had acted improperly, or unreasonably, and why the evidence which petitioners then sought to introduce was necessary. The court then permitted counsel for respondents to argue why the record was sufficient. Where the district court judge concluded from his own review of the record (which was thorough) and from counsels' arguments that further testimony would be only cumulative of what was in the administrative record, and was not necessary to aid him in his understanding of the issues, the evidence was excluded.[3]

Although *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977) does authorize a much broader evidentiary hearing than was permitted by the court below, it does not give rise to a need for review by this Court. *County of Suffolk* was decided *before Vermont Yankee*, and the broad evidentiary hearing which it supported is clearly at odds with, and cannot survive, the decision in *Vermont Yankee*. Moreover, no circuit which has considered the question since the decision in *Vermont Yankee* has adopted the broad language of *County*

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3. Even using this form of review, the hearing before the District Court lasted eight days. One can imagine the length of a review proceeding where petitioners are permitted to present live testimony on every issue which they had presented to the administrative agency and which the agency resolved against them.

of Suffolk and the principle of unfettered presentation of evidence sought by petitioners here.[4]

2. *The Evidence Which Petitioners Claim Was Improperly Excluded Was Repetitive And Cumulative And Was Never Properly Proffered.*

Rule 61, Fed. R. Civ. P. and Rule 103(a) Fed. R. Evid. make it abundantly clear that erroneous evidentiary rulings are not grounds for reversal unless the ruling deprives one of substantial rights and, in the case of the exclusion of evidence, it was clearly and properly proffered to the trial court. Petitioners stated repeatedly to the District Court that all of the witnesses they desired to call would merely "elaborate on material presented to each relevant agency by such witness, his agency, or others," (Appendix "B" to Brief, p. B-1).

In the Court of Appeals, petitioners referred to only five witnesses whose testimony they claimed was erroneously excluded by the District Court; i.e., "biology experts," Paul Harmon, Kathryn Auerback, Samuel Landis, and Colleen Wells.

(a) *Biology Experts:* The District Court admitted the testimony of Richard McCoy of the U.S. Fish and Wildlife Service. The balance of the proffered testimony was already in the Corps' administrative file, (Appendix "B" to Brief, p. B-2 to B-5).

(b) No proffer of *Paul Harmon* was actually made.

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4. Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1028 (4th Cir. 1975) *cert. denied*, 423 U.S. 912 (1975). *See also*, Asarco, Inc. v. Environmental Protection Agency, 616 F.2d 1153 (9th Cir. 1980); Izaak Walton League of America, *supra*. (D.C. Cir. 1981); Avoyelles Sportsmen's League, Inc. v. Marsh, *supra*. (5th Cir. 1983).

(c) *Kathryn Auerbach and Samuel Landis* were never properly proffered to the court as witnesses, nor did the court make any ruling excluding their testimony.

(d) *Samuel Landis'* testimony was excluded as hearsay, (Appendix "B" to Brief, p. B-5).

(e) Colleen Wells' testimony was never proffered, (Appendix "B" to Brief, p. to B-6 to B-7).

The administrative record containing the submissions of these and other witnesses was before the District Court; even petitioners' counsel admitted that the proffered testimony was cumulative. This Court certainly should not grant review of an evidentiary ruling which was so clearly within the proper range of the District Court's discretion.

C. THE DISTRICT COURT CORRECTLY RULED IN DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION THAT PETITIONERS DID NOT DEMONSTRATE A REASONABLE LIKELIHOOD OF PREVAILING ON THEIR CLAIM UNDER THE NATIONAL HISTORIC PRESERVATION ACT; THE DISTRICT COURT DID NOT REACH THE ULTIMATE MERITS

The District Court ruled, in pertinent part, that petitioners were not likely to prevail on their claim under the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§470 *et seq.*[5] But petitioners continue to address only the merits of the Corps of Engineers compliance with the Act; issues which are properly to be decided in the first instance by the District Court at trial on petitioners' request for a permanent injunction. The issues raised by

5. Petitioners have not appealed, indeed could not appeal under 28 U.S.C. §1291(a)(1), the District Court's dismissal of their NHPA claims under F.R.C.P. 12(b)(1). See A-6; A-15 to A-16; A-65 to A-66.

petitioners are primarily factual and it is inappropriate to raise them on appeal challenging a denial of a preliminary injunction. *University of Texas v. Camenisch*, 451 U.S. 390, 394-395, 398 (1980); *Brown v. Chote*, 411 U.S. 452, 457 (1973). Assuming, arguendo, that Section 110(f) of the Act was applicable to this project,[6] and the NHPA issues are ripe for decision by this Court, the Corps of Engineers fully complied with the obligations imposed thereby and no issue of national importance is presented to justify this Court's certiorari jurisdiction.

Section 110(f) provides:

> Prior to the approval of any Federal Undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal Agency shall, to the maximum extent possible, *undertake such planning and actions as may be necessary to minimize harm to such Landmark*, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. (Emphasis supplied).

Petitioners argue that Section 110(f) imposes a mandatory obligation on the Corps of Engineers to consider alternatives to this privately owned and privately financed project which may have a technically adverse impact on a national landmark. The sole controlling precedent upon which they rely is *Citizens to Preserve*

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6. Section 110(f) applies to historic properties owned or controlled by Federal agencies. It does not apply where a federal agency is permitting a privately owned and privately financed project. Indeed, the introductory language of Section 110(f) states "(t)he heads of all Federal Agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency." 16 U.S.C. §470 H-2(a)(1). The Delaware Canal is neither owned nor controlled by a federal agency; it is owned and controlled by the Commonwealth of Pennsylvania. Furthermore, this project is not supported by any federal funds or any other kind of federal assistance.

Overton Park v. Volpe, 401 U.S. 402 (1971). In *Overton Park*, however, this Court was not concerned with the NHPA, but rather with Section 4(f) of the Department of Transportation Act of 1966 ("DOTA"), as amended, 49 U.S.C. §1653(F), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138.[7] Both highway statutes contain express language requiring consideration of "*prudent and feasible alternatives to potentially destructive action.*" (Emphasis supplied).

Under these highway statutes, the Secretary of Transportation must engage in a two-step review process before funding construction. First, s/he must look at all alternatives to building in a public park. If after reviewing the alternatives none is determined feasible and prudent, the Secretary of Transportation must be assured that there has been all possible planning to minimize harm to the park.

Although the legislative history of Section 110(f) of NHPA does contain reference to consideration of "prudent and feasible alternatives," the Act does not. And the differences between Section 110(f) of NHPA and Section 4(f) of DOTA are significant.

Section 4(f) of DOTA is mandatory; it prohibits the Secretary of Transportation from approving transportation plans or programs which require the use of public parks if there is a feasible and prudent alternative to such use. An earlier version of Section 110(f) did contain an express requirement that the reviewing agency consider feasible and prudent alternatives to an action which would potentially adversely affect a National Historic Landmark. This language, however, was deliberately deleted from the bill and was not reinstated in the final form.

The legislative history of Section 110(f), on the other hand, does contain discretionary language; it says

7. The full text of these two statutory provisions are included in the Appendix "A" to Brief.

only that the Committee (the Committee on Interior and Insular Affairs, to whom the bill to amend the NHPA of 1966 was referred) intends that feasible and prudent alternatives be considered. (*See, e.g.* H.R. Rep. No. 96-1457, at 38, 96th Cong., 2nd Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 6378, 6401. However, the deletion of the mandatory requirement to consider alternatives from the statutory language must mean that while it may be appropriate or desirable in some cases to consider alternatives, failure to do so is not *per se* non-compliance with the law.

Moreover, there is a significant difference in the underlying public policy of the two statutes and on that basis as well, Section 4(f) of DOTA imposes a more stringent review standard on the Administrator than does Section 110(f) of NHPA. As noted by the Court in *Overton Park, supra*, from the point of view of efficiency of development, parkland will always be the preferable site for a highway. If parkland is used, there is no need to condemn private property and there is no displacement of residents or workers. Thus, for Section 4(f) of DOTA to have meaning, the Secretary must be prohibited from approving the destruction of parkland unless he finds that alternative routes present unique problems. *Overton Park, supra* at 412. Obviously, there is no such preference for public destruction of natural historic landmarks and, therefore, the express language of Section 110(f) is capable of adequately protecting those landmarks without so severely restricting the reviewing agency and, more importantly, private parties.

Despite the explicit language of Section 110(f) and its legislative history, petitioners argue that the Corps of Engineers did not meet its 110(f) responsibilities because it failed to identify, consider or adopt a canal crossing which would minimize harm to the canal (Petitioners' brief at 42). This is not the Section 110(f) standard. Taking the most conservative view, the Corps of Engineers was only required to consider alternatives in as-

sessing ways to minimize harm to the landmark. This obligation was met.[8]

In evaluating the Corps of Engineers consideration of alternatives, the District Court ruled that the Corps of Engineers was entitled to rely upon the DRBC's conclusions with regard to alternative canal crossings. DRBC's evaluation of project alternatives was exhaustive and DRBC rejected each alternative as infeasible, (*See, e.g.*, Finding of Fact 107, A-123). This conclusion by the DRBC was subjected to intense judicial scrutiny and was upheld, *Delaware Water Emergency Group v. Hansler, supra*; a decision which is binding upon petitioners, (A-24 to A-25).

The Corps of Engineers review of alternatives also included an evaluation of the Environmental Assessment prepared by DER in 1982 and NWRA's own analysis which carefully considered the alternatives which might be pursued and the likely impact of these alternatives, (*See, e.g.*, Findings of Fact 108-113, A-124 to 126). On the basis of all these evaluations, the Corps of Engineers concluded that crossing the canal was required and that the only prudent and feasible crossing place was Point Pleasant, (*See, e.g.*, Findings of Fact 104, A-123 and 112, A-126).

The Corps of Engineers took additional steps consistent with its Section 110(f) responsibilities. The Corps of Engineers had before it a record that demonstrated a long-standing (since 1978) and ongoing effort by NWRA, DER, the Pennsylvania Historical and Museum Commission, DRBC, and the Heritage Conservation and Recreation Service to plan and execute a project which would not only mitigate any potential harm to the canal, but would, in fact, be beneficial, (*See, e.g.* Finding of Fact 113, A-126).

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8. Respondent NWRA does dispute petitioners allegation that the Corps of Engineers "wholly failed to consider alternative projects." (Petitioners brief at 45). *See, e.g.*, Findings of Fact 104, A-123 and 108-111, A-124 to A-126; A-28.

Despite this conclusion, the Corps of Engineers consulted with the State Historic Preservation Officer and Advisory Council on Historic Preservation and developed a Memorandum of Agreement ("MOA") with these agencies and the NWRA which required NWRA to follow conservative construction techniques in laying the pipeline under the canal and to use carefully controlled blasting methods under the scrutiny of DER, owner of the landmark. The MOA provides for administrative agency oversight of the entire construction process and for archaeological study and recording of the construction in and around the canal during the construction period, (*See, e.g.*, Findings of Fact 114-116, A-127).

It is therefore clear why the District Court found that the petitioners were not likely to prevail on the merits under Section 110(f). Legally, petitioners were not entitled to review[9] and factually, the Corps of Engineers fully complied with its Section 110(f) responsibilities.

Since there is abundant basis to support the District Court's conclusion that petitioners were not likely to prevail on their claim under the NHPA, (*See, e.g.* A-27 to A-33) this Court should not accept certiorari. If petitioners desire a complete review of the Corps of Engineers Section 110(f) evaluation, they must first seek review at a final hearing on the merits before the District Court. The clearly factual nature of the issues involved precludes any further consideration until such time as petitioners pursue that remedy.

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9. *See* fn. 5, *supra*.

IV. CONCLUSION

For the foregoing reasons, Neshaminy Water Resources Authority, respondent herein, respectfully requests that this "Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit" be DENIED.

Respectfully submitted,

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Date: December 2, 1983

CERTIFICATE OF COUNSEL

I, Alan M. Lerner, do hereby certify that I am a member in good standing of the United States Supreme Court.

Alan M. Lerner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Brief of Neshaminy Water Resources Authority In Opposition To Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit" on behalf of Respondent, Neshaminy Water Resources Authority, has this day been mailed to the Clerk of this Court and has been served upon Counsel of Record listed on the attached service list by United States first class mail, postage prepaid.

By: _____
Alan M. Lerner

Sworn to and subscribed
before me this 2nd day of
December, 1983.

_____
Notary Public

PHYLLIS S. LEVIN
Notary Public, Phila., Phila. Co.
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APPENDIX

APPENDIX "A" TO BRIEF

Section 4(f) of the Department of Transportation Act of 1966 provides:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. §1653(f) (1964 ed., Supp V).

Section 18(a) of the Federal-Aid Highway Act of 1968 provides:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall co-

operate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

23 U.S.C. §138 (1964 ed., Supp V).

APPENDIX "B" TO THE BRIEF

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., *et al.*, *Plaintiffs*	)	
v.	)	CIVIL ACTION
ROGER M. BALDWIN, *et al.*, *Defendants*	)	NO. 82-5115

MEMORANDUM REGARDING DEL-AWARE'S PRELIMINARY INJUNCTION HEARING PLAN

. . .

I. *Order Of Witnesses And Summary Of Testimony*

Plaintiffs presently plan to present the following witnesses at the Preliminary Injunction Hearing:[1] [2]

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1. All witnesses will elaborate on material presented to each relevant agency by such witness, his agency, or others.

2. Plaintiffs may vary this list due to availability of witnesses, need, and avoidance of duplicate testimony.

(Joint Appendix to the U.S. Court of Appeals for the Third Circuit, p. A-191).

SELECTED PORTIONS OF TRANSCRIPT OF THE HEARING BEFORE THE DISTRICT COURT ON PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

. . .

"THE COURT: Do you concede that every subject concerned that the plaintiffs would advance here had been raised to the deciding agencies?

MR. SUGARMAN: Absolutely, with one or two maybe exceptions about things that came up at the last moment. Within the last week even things are still happening, the archaeologists are finding things on site that the agency —

THE COURT: That side (sic).

MR. SUGARMAN: We blanketed the agency, we told them all about the concerns and we provided them with detailed discussions; we provided them with expert evidence in some cases and other federal agencies like the Fish and Wildlife Service kept telling the Corps, this should be done and this should be done and asked the Corps to study and make an independent appraisal. All of these matters were brought to the attention of the agency repeatedly, just as in the West Way case, the agency had the information before it. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2150).

. . .

"MR. SUGARMAN: . . .

Again, Your Honor, our point is, if they didn't accept what we said, their option was to do an environmental impact statement to find the answer. There was a serious substantial dispute on a scientific matter. It could have a substantial and significant effect on the — the fish people told them that over and over, again and again, we cite the letter from the Pennsylvania Fish

Commission of March 24, 1982. Counsel for the Pennsylvania Fish Commission are here, the witnesses are here from the Pennsylvania Fish Commission. I am sure Your Honor will hear counsel. The witnesses are here if Your Honor wishes to hear them. . . .

THE COURT: Your position is that there is evidence that the intake mouth is presently in the eddy flow?

MR. SUGARMAN: Yes, sir.

THE COURT: At certain flows?

MR. SUGARMAN: Yes, sir.

THE COURT: Do you have another point?

MR. SUGARMAN: On the intake and on the eddy, yes, sir. Only additional statements of essentially the same thing, Your Honor. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2261-62).

. . .

"MR. SUGARMAN: . . . .

But, Your Honor, the fish people are convinced that there are shad spawning going on there in Point Pleasant and they so testified and they so advised the Corps of Engineers, and we sent their system onto the Corps of Engineers, but they are here today, too, Your Honor, and they are prepared to testify. . . ."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2269).

. . .

"MR. SUGARMAN: I take it, you will not need any witnesses on this, and will not be admitting any oral testimony on this subject?

THE COURT: Yes, I have all that I need, I believe on this issue.

MR. SUGARMAN: Very good.

THE COURT: I don't know of anything that any witness would add to the record, do you?

MR. SUGARMAN: Yes, sir. I think the witnesses on the fish could explain to Your Honor why it is that they anticipate from their history of managing fish, I am talking about the fish experts, and the fish agencies, why there is no reason to expect that anything is likely to be done that would enable the fish to be protected in the likely probability this intake has an adverse affect on fish. I also think —

THE COURT: What you do (sic) mean by that?

MR. SUGARMAN: Assuming the question that Mr. Goldberg was raising and Mr. Richman was raising, can the DRBC protect the fish by changing the operation or changing the permit or whatever or taking action in response to monitoring and the fish people likely to have input to that, I am talking about the U.S. Fish and Wildlife and the Pennsylvania Fish Commission, and the witnesses can testify of the history, what they had to do to get the DRBC to protect fish.

THE COURT: I understand the proffer (sic) testimony.

MR. SUGARMAN: I am sorry.

THE COURT: Go ahead.

MR. SUGARMAN: The other principal area of evidentiary testimony that we would offer is to indicate that the intake is not only in an area of lower velocity than that which is necessary to protect them in the main channel or that is to say, on the side closer to the main channel but on the side closer to the eddy, it is subject to the eddy flows which are substantially lower than the flows in the river and where the fish would be repeatedly subjected. In other words, that's a disputed point we contend.

THE COURT: Were these contentions put before the Corps?

MR. SUGARMAN: Yes, sir.

THE COURT: It's on the record?

MR. SUGARMAN: Yes, sir.

THE COURT: Okay, I do not require testimony on what is already in the record."

(Joint Appendix to the United States Court of Appeals for the Third Circuit, p. A-2392-2393).

. . .

"THE COURT: I am certainly not in a position to say that the site is archaeologically insignificant. Nor am I in a position to say that it is significant.

MR. SUGARMAN: There is one other matter relating to that and again Mr. Landis and Miss Auerbach are here and can testify the consultant they hired to do the project is from Michigan. But in taking the stuff out that they're doing now, they are transporting it to Michigan, their office is in Michigan. They are not Pennsylvania archaeologists. They admit frankly, they're not familiar with the nature of what they're looking at in this —

THE COURT: You're testifying.

MR. SUGARMAN: Well, I am offering discussion and I am offering a witness to testify.

THE COURT: Subpoena the archaeologists, the ones who are responsible for doing — who are out there. It's hearsay to have even testimony about what — people who are not in the courtroom say.

MR. SUGARMAN: Mr. Landis, who is in the courtroom was part of the archaeological team.

THE COURT: It's still hearsay as to what was said to him about the archaeologist who was at the site.

MR. SUGARMAN: I agree, sir. . . ."

(Joint Appendix to United States Court of Appeals for the Third Circuit, p. A-2817).

. . .

"MR. SUGARMAN: In summary, we contend that the documents and the testimony of Miss Wells, who visited the Corps frequently, make it clear that the Corps had decided before the completing of its environmental assessment that they were not going to prepare an environmental impact statement, and had kept documents from the public, such as its salinity study and such.

A letter it wrote to Fish and Wildlife Service and numerous other documents and actions that it took, and memorandum in the record, in the Corps' record, would suggest that the Corps was essentially engaged in an effort to get the permit issued rather than an investigation.

THE COURT: What is your next category?

MR. SUGARMAN: The next category is the failure to permit the public to respond to the submissions of the applicant in a timely fashion.

And the essential facts are this, they wouldn't give out documents that the applicant had submitted, and thereby made it impossible to receive public comment. In some cases, formal Freedom of Information requests had to be filed.

The next point is the — and final point, is the failure to prepare an environmental impact statement with respect to the permit issuance.

I categorize that as a procedural defect because the cases have described the duty to prepare an environmental impact statement as a procedural legal obligation.

One other, that is the public interest, arbitrary and capricious action in regard to the public interest determination, and I really must say, I think that's more of a matter of legal argument because the facts are already, I think are before the Court on the individual issues.

THE COURT: If there was a cover-up and predetermination in your view there would be arbitrary and capricious action?

MR. SUGARMAN: Exactly. . . ."

"THE COURT: We will proceed with your presentation, Mr. Sugarman, before defendants respond on failure to consider cumulative effects, duty to make an independent evaluation, failure to await the NRC action and the Plumstead Township action, misinterpretation of the rule of the Fish Commission, Pennsylvania Fish Commission.

So, you will not be addressing the Clean Water Act issues or the cover-up and predetermination at this time. You have finished the segmentation issue.

MR. SUGARMAN: I finished it with this exception, Your Honor: I would like to mention two documents which — well, in light of what Your Honor said.

THE COURT: You said you had finished the segmentation issue.

MR. SUGARMAN: I am finished, Your Honor. That would be more, just more cumulative information. . . ."

(Joint Appendix to United States Court of Appeals for the Third Circuit, p. A-2843,44,45).